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Supreme Court, U.S.

No. 98-1456 MAR 8 1999

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RODNEY J. AHITOW,

Petitioner,

v.

JAMES P. GLASS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit erroneously found that time which accrued before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 cannot be counted against that Act's statute of limitations, when the majority of the Circuits to have addressed the matter appear to hold to the contrary.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on August 20, 1998.

OPINION BELOW

The August 20, 1998 *per curiam* decision of the United States Court of Appeals for the Seventh Circuit, which was consolidated with two unrelated cases under the name *Gendron v. United States*, is published at 154 F.3d 672 (7th Cir. 1998). This decision is reprinted in the appendix to this petition. The December 8, 1998 order of the Court of Appeals, denying Ahitow's Petition for Rehearing with Suggestions for Rehearing *En Banc*, apparently is unreported, and is reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on August 20, 1998, and rehearing was denied on December 8, 1998. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The United States District Court for the Central District of Illinois asserted jurisdiction under 28 U.S.C. § 2254. The United States Court of Appeals for the Seventh Circuit asserted jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

Respondent, James P. Glass, had appealed from a final judgment of the United States District Court for the Central District of Illinois dismissing as time-barred Glass's petition for writ of *habeas corpus* brought pursuant to 28 U.S.C. § 2254. On October 17, 1991, Glass was convicted, following a jury trial in McLean County, Illinois, of three counts of aggravated criminal sexual assault and one count of aggravated criminal sexual abuse. Glass was sentenced to three consecutive terms of 25 years' imprisonment, and one concurrent term of seven years' imprisonment.[1] On December 28, 1992, Glass's conviction and sentence were affirmed on direct appeal by the Appellate Court of Illinois, Fourth Judicial District. *People v. Glass*, 239 Ill.App.3d 916, 606 N.E.2d 655 (4th Dist. 1992). Glass did not petition for leave to appeal to the Illinois Supreme Court from that decision.

On August 18, 1994, Glass filed a petition in the Circuit Court of McLean County, Illinois pursuant to the Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq*. The petition was denied on September 20, 1994. Glass appealed, and on February 3, 1997, the

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[1] The United States District Court's Order appears to be in error in its indication that Glass received a concurrent term of 7½ years.

Illinois Appellate Court, Fourth Judicial District, affirmed the denial of post-conviction relief in an unpublished order pursuant to Illinois Supreme Court Rule 23. Glass then filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on June 4, 1997.

Glass filed his federal petition for writ of *habeas corpus* with the United States District Court for the Central District of Illinois on January 12, 1998. On January 16, 1998, the District Court dismissed the petition as time-barred under the statute of limitations enacted under 28 U.S.C. § 2244(d). The court concluded that Glass's petition was untimely by counting against the statute's one year statute of limitations an 18-month period following the completion of Glass's direct appeal[2] but before Glass filed his post-conviction petition, plus another 7-month period between the June 4, 1997 denial of leave to appeal on his post-conviction appeal and the January 12, 1998 filing of his federal *habeas* petition.[3] The court concluded that the 25-month total exceeded the one year statute of limitations, and

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[2] The court found that the clock started running following January 27, 1993, the date which the District Court concluded would be the last date for Glass to seek leave to appeal. Actually, the District Court may have been too generous in this respect, since, under Illinois Supreme Court Rule 315(b), Glass would have had to commit to seeking leave to appeal within 21 days of the decision to avoid losing his right to seek leave.

[3] As for the period between the August 18, 1994 filing of the post-conviction petition in the circuit court and the June 4, 1997 Illinois Supreme Court denial of leave to appeal following the appellate court's affirmance of the denial of post-conviction relief, the District Court found that the clock had been stopped pursuant to 28 U.S.C. § 2244(d)(2).

accordingly dismissed the petition. Glass initiated an appeal, then filed an application for a certificate of appealability, which the District Court denied on February 23, 1998.

Before any grant of a certificate of appealability or the setting of a briefing schedule, Glass filed a brief in the United States Court of Appeals for the Seventh Circuit. Then, without allowing for any briefing by Ahitow, the Court of Appeals entered its *per curiam* decision on August 20, 1998. It granted a certificate of appealability, and held that, in light of this Court's decision in *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2068 (1997), the statute of limitations enacted at 28 U.S.C. § 2244(d) as part of the Antiterrorism and Death Penalty Act of 1996 (AEDPA) did not begin to run until April 24, 1996, the date of the enactment of the AEDPA. The court found that the District Court had erred in counting against the provision's one-year statute of limitations any time which may have accrued before April 24, 1996. Then, finding that the period during which post-conviction proceedings and the appeal therefrom tolled the running of the limitations period, the Court concluded that Glass's *habeas* petition was timely filed, and remanded for consideration of the merits of the petition.

Ahitow timely filed a Petition for Rehearing with Suggestion for Rehearing *En Banc*. The Court of Appeals ordered that counsel for Glass respond. Not having counsel, Glass then requested that counsel be appointed to file the response. The Court of Appeals appointed counsel, who filed an Answer to the Petition for Rehearing. On December 8, 1998, the Court of Appeals denied Ahitow's Petition for Rehearing. Thereafter, on Decem-

ber 23, 1998, on Ahitow's motion, the Court of Appeals stayed its mandate pending the petition for writ of certiorari.

Petitioner, Rodney J. Ahitow, now seeks a writ of certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The Court Of Appeals Erred In Finding That Time Accrued Before The Enactment Of The Antiterrorism And Effective Death Penalty Act Of 1996 Cannot Be Counted Against That Act's Statute Of Limitations When The Majority Of The Circuits To Have Addressed The Matter Appear To Hold To The Contrary.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). As part of that Act, Congress included for the first time a statute of limitations governing federal *habeas corpus* actions. Relevant here are the following portions of the Act's provisions regarding the statute of limitations:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> * * *

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §§ 2244(d)(1)(A), 2244(d)(2).

Respondent James Glass's state court conviction was affirmed on direct appeal on December 28, 1992, and the time for Glass to seek leave to appeal to the Illinois Supreme Court was, at most, 35 days thereafter, or February 1, 1993. *See* Illinois Supreme Court Rule 315(b). Glass did not seek leave to appeal. Approximately eighteen months passed, and on August 18, 1994, Glass filed a petition challenging his conviction under the Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq*. That petition, and the appeal from the denial of that petition lasted from August 18, 1994 through June 4, 1997. Thereafter, Glass filed his federal *habeas corpus* petition on January 12, 1998.

The United States District Court dismissed the petition as time-barred, concluding that the 18-month period between the direct appeal and the filing of the post-conviction petition, plus the seven-month period between the end of post-conviction review and the filing of the federal *habeas* petition counted against Glass for purposes of the one-year statute of limitations. The Court of Appeals reversed, holding that the earlier 18-month period could not be counted for statute of limitations purposes because it predated the enactment of the AEDPA. The notion that time accrued before the enactment of the AEDPA cannot be counted with respect to the statute of limitations adopted in that Act is

clearly erroneous, and in contravention of how the majority of the Circuit Courts of Appeal which have dealt with the issue, including the Seventh Circuit before its decision in this case, have interpreted the AEDPA's statute of limitations.

In support of its decision, the Court of Appeals purported to rely on this Court's decision in *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997), finding as follows:

> In *Lindh v. Murphy*, ___ U.S. ___, ___, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997), the Supreme Court concluded that Congress intend [*sic*] for most of the AEDPA provisions to apply only to cases filed after April 24, 1996. We agree with the Tenth Circuit that this holding extends to the period of limitations contained in § 2244. See *Hoggro v. Boone*, 150 F.3d 1223, 1224 (1998). Thus, for § 2254 petitions the period of limitations does not begin to run until April 24, 1996, the AEDPA's enactment date. *See id.* Consequently, the district court incorrectly counted the period between the conclusion of Glass's direct review in 1993 and the commencement of post-conviction proceedings in 1994. Because Glass had a properly filed postconviction [sic] petition when the AEDPA was enacted, his period of limitations tolled at least until June 4, 1997, when the Illinois Supreme Court denied leave to appeal. Accordingly, Glass's § 2254 petition, filed on January 12, 1998, was timely.

Gendron v. United States, 154 F.3d 672, 675 (7th Cir. 1998). This analysis is most problematic.

The court's attempt to find support for its position in *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2068

(1997), is entirely misplaced. *Lindh* indeed held that "the new provisions of chapter 153 generally apply only to *cases* filed after the Act became effective." (117 S.Ct. at 2068; emphasis added). However, Petitioner Glass's habeas petition *is* a case filed after the effective date of the AEDPA, so the application of the provisions of the Act to Mr. Glass's petition cannot be deemed barred by *Lindh*. While *Lindh* barred application of the new provisions of the AEDPA to "cases" filed before the enactment of the AEDPA, it did not bar application of those new provisions to mere "events" which preceded enactment of the AEDPA. In the case at bar, the District Court applied the new provisions to mere "events" preceding enactment of the AEDPA when it counted against Glass the approximately one and one-half years between the completion of his direct appeal and the filing of his post-conviction petition. As will be shown, *infra*, the district court cannot be faulted for having done so.

With respect to *Hoggro v. Boone*, 150 F.3d 1223 (10th Cir. 1998), Ahitow cannot deny that the Tenth Circuit there held that the statute of limitations began to run with the April 24, 1996 enactment of the AEDPA. But, contrary to the view of the Court of Appeals in this case, the *Hoggro* court did not purport to rely on this Court's *Lindh* decision to support that finding. Rather, it purported to rely on, *inter alia*, the Seventh Circuit's own decision in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (*en banc*), which it cited as having been reversed on other grounds by this Court.

But the Seventh Circuit's decision in *Lindh* actually undercuts the decisions in both *Hoggro* and the case at bar. In *Lindh*, the Seventh Circuit Court of Appeals

essentially adopted a one-year "grace period" for the filing of habeas petitions so that those whose judgments already had been final for a year when the AEDPA was enacted would not be precluded from seeking the writ. Had the "period of limitations" provided for in 28 U.S.C. § 2244(d)(1)(A) been deemed to begin on April 24, 1996, there would have been no need for the Seventh Circuit, and the other courts which followed suit, to have adopted a grace period at all. *See Burns v. Morton,* 134 F.3d 109 (3rd Cir. 1998); *United States v. Flores*, 135 F.3d 1000 (5th Cir. 1998); *Brown v. Angelone*, 150 F.3d 370 (4th Cir. 1998); *Calderon v. United States District Court for the Central District of California*, 128 F.3d 1283 (9th Cir. 1997); *Ross v. Artuz*, 150 F.3d 97 (2nd Cir. 1998); *see also, United States v. Simmonds*, 111 F.3d 737 (10th Cir. 1997).[4] The actual language of the provision, which speaks of "the date on which judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," appears inconsistent with any notion that it was intended to cover only future judgments.

The Seventh Circuit's determination that the period of limitations did not begin to run until April 24, 1996, is inconsistent with at least two other decisions by panels of that same court. In *O'Connor v. United States*, 133 F.3d 548 (7th Cir. 1998), a case decided after this Court's decision in *Lindh*, a panel of the Seventh Circuit addressed the appeal of a petitioner under 28

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[4] The finding, in *Hoggro*, that the statute of limitations of the AEDPA did not begin to run until the AEDPA's April 24, 1996 enactment, appears inconsistent with that same court's views in *Simmonds*.

U.S.C. § 2255. When O'Connor filed his petition, he had pending another proceeding which might upset the conviction under consideration, and the district judge remarked that only extraordinary circumstances justify entertaining a collateral attack given the pendency of such another proceeding. In response, O'Connor argued that such a circumstance was presented by the fact that there were only six days to go before the first anniversary of the AEDPA, a position the *O'Connor* panel appears to have found persuasive. The panel stated:

> That anniversary was significant for three reasons: first the AEDPA added a one-year statute of limitations for commencing collateral attacks under 28 U.S.C. § 2255 ¶ 6; second, post-judgment motions (such as those under Rules 32, 33, and 35) do not suspend the period, so O'Connor *had accumulated one year of "countable" time even before the AEDPA's enactment*; but, third, we stated in *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), reversed on other grounds, ___ U.S. ___, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), that "no collateral attack filed by April 23, 1997, may be dismissed under § 2244(d) and the parallel provision added to 28 U.S.C. § 2255 by § 105 of the 1996 Act." O'Connor got his petition in under the wire. *Young v. United States*, 124 F.3d 794, 795-96 (7th Cir. 1997), holds that this aspect of *Lindh* is unaffected by the Supreme Court's conclusion that the AEDPA's amendments to §§ 2244-55 do not apply to cases filed before April 24, 1996. So O'Connor's petition on April 17, 1997 was timely. Had he waited a few days longer it would have been too late. 133 F.3d at 550 (emphasis added).

Given the emphasized language and the reference to the earlier holding in *Young v. United States* in the foregoing quotation, it is clear that the Seventh Circuit either impliedly (*Lindh*) or expressly (*O'Connor*) had found that time which accrued before the enactment of the AEDPA could be counted in determining the timeliness of a habeas petition.

Ahitow maintains that the proper analysis of the issue is found in such cases as *Brown v. Angelone, supra, and United States v. Flores, supra.* In those cases, the courts recognized that limitation periods are procedural in nature, and therefore "[c]ourts normally apply the statute of limitations in operation at the filing of the suit even if enacted subsequent to the conduct giving rise to the suit, effectively shortening the period available for a plaintiff to file." *Brown*, 150 F.3d at 373; *see also*, *Flores*, 135 F.3d at 1003-1004. At the same time, both courts, acknowledging such precedents as *Wilson v. Iseminger*, 185 U.S. 55, 22 S.Ct. 573 (1902), recognized that a newly enacted shortened limitations period could not be retroactively applied in such a manner as to extinguish a litigant's cause of action. The courts therefore held that a grace period, in each instance, one year, would be necessary to accommodate federal *habeas* petitioners who otherwise would be time-barred under the AEDPA's statute of limitations. *Brown*, 150 F.3d at 373-374; *Flores*, 135 F.3d at 1004-1006. In its earlier decision in *Lindh*, the Seventh Circuit had reached a like conclusion. However, in the case at bar, the Seventh Circuit essentially abandoned that formulation. Apparently it did so because, under it, Glass apparently would be time-barred, since he had lost more than a year before the enactment of the

AEDPA and did not file his federal *habeas* petition within a year of the enactment of the AEDPA. Even assuming that Glass' right to seek *habeas* relief would thereby have been extinguished, there is no reasoned basis for the Seventh Circuit's departure from its earlier holdings that time which accrued before the enactment of the AEDPA counted against the statute of limitations.

This leads to consideration of Mr. Glass's case. Since, under § 2244(d)(1)(A), his one-year period in which to seek habeas relief would have ended in January, 1994, before enactment of the AEDPA, he arguably was in need of the one-year grace period recognized in the Seventh Circuit *Lindh* decision in order to file a timely *habeas* petition. Glass did not file his habeas petition by that April 23, 1997 grace period date. However, that need not be the end of the inquiry in Mr. Glass's case. This is so because, for the entirety of the grace period year recognized in *Lindh*, Glass had post-conviction proceedings pending in the state courts.[5] Given that the exhaustion requirement of 28 U.S.C. § 2254(b)(1)(A) remained unchanged by the amendments in the AEDPA, Glass might legitimately have believed that he needed to exhaust in the state courts claims he intended to raise on federal *habeas* before he could file his *habeas* petition, and thus would have missed the one-year grace period recognized in *Lindh*. On the other hand,

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[5] If, as Ahitow contends, the limitations period began running at the end of Glass's direct appeal, then 28 U.S.C. § 2244(d)(2) cannot be used, as the district court and the Court of Appeals in this case used it, to have "tolled" the period of limitations. The period of limitations technically had run even before enactment of the AEDPA.

one whose year had run before enactment of the AEDPA might have believed that April 23, 1997 was the last possible date to file a habeas petition, and thus would have filed by that date a habeas petition to insure the availability of the remedy, notwithstanding the pendency of state court proceedings. See, *Parisi v. Cooper*, 961 F.Supp. 1247 (N.D. Ill. 1997).

To the extent that Glass needed to use the ongoing state post-conviction proceedings to exhaust a claim which is also raised in his federal habeas petition and Glass thereby used the entirety of the grace period recognized in *Lindh*, perhaps the recognition of an extended grace period would be warranted. On the other hand, to the extent that all of Glass's federal claims were already exhausted before the state post-conviction proceedings, there appears no reason that Glass should not have been bound by the one-year grace period recognized in *Lindh*. Since Ahitow had no input in this case in either the District Court or in the Court of Appeals before rehearing, it does not appear that the Court of Appeals was in a position to know which was the case. But, its conclusion that the statute of limitations did not begin to run until the enactment of the AEDPA is clearly erroneous, and *certiorari* should be granted to address this issue of first impression and to correct that error. Thereafter, a more thorough record might be developed to allow the lower courts to determine whether or not to recognize an additional grace period with respect to Glass' *habeas* petition.

One might assert that Ahitow's argument for recognizing an extended grace period in certain instances, instead of recognizing April 24, 1996 as the beginning

of the limitations period under the AEDPA, is merely semantic. Ahitow denies that such is the case. Ahitow can envision various scenarios where unfair results would ensue by recognizing the latter concept instead of the former. For example, assume a *habeas* petitioner who, six months after his direct appeal is final, first files a post-conviction petition which pends in the state courts through the entirety of the grace period recognized in *Lindh*. Under the limitations period formulation recognized by the Seventh Circuit in *O'Connor* and *Lindh*, since the one-year limitations period began on completion of the direct appeal, and the period was then tolled during the post-conviction proceedings, the *habeas* petitioner would have six months after completion of the post-conviction proceedings in which to file his federal *habeas* petition. Under the limitations period formulation espoused by Court of Appeals in this case, however, the same petitioner would have an entire year after the end of the post-conviction proceedings to file a federal *habeas* petition because the one-year limitations period had not even begun to run until April 24, 1996.

Lest such obvious inequities occur, *certiorari* should be granted to interpret the statute of limitations found in the AEDPA, and to give guidance to *habeas* litigants and the federal courts alike.

CONCLUSION

For the aforementioned reasons, Petitioner, Rodney J. Ahitow, respectfully requests that this Honorable Court grant *Certiorari*, reverse the decision of the Court of Appeals, and remand for further proceedings.

Respectfully submitted,

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